No. 18878

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAURENCE FREDERICK ANTHONY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

This court has jurisdiction under Title 28, United States Code, Sections 1291 and 1294. The jurisdiction of the District Court rested on Title 18, United States Code, Section 3231, Title 21, United States Code, Section 176(a), Title 28, United States Code, Section 2255, and Rule 35 of the Federal Rules of Criminal Procedure.

II.
STATUTE INVOLVED.

The indictment in this case was brought under Title 21, United States Code, Section 176(a), which provides in pertinent part as follows:

> "Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the

United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000 . . .

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

III.

STATEMENT OF THE CASE.

Appellant, Laurence Frederick Anthony, was indicted by the Federal Grand Jury on March 27, 1957, for violations of Title 21, United States Code, Section 176(a) for selling 5 ounces of marihuana on Feb. 23, 1957 and 2 pounds, 5 ounces of marihuana on March 11, 1957, and was convicted on May 23, 1957. On June 10, 1957 [C. T. 2],* the Honorable William C. Mathes, United States District Judge sentenced the appellant, Laurence Frederick Anthony, to the custody of the Attorney General for a period of 20 years and a fine of $5,000 to be paid to the United States for

*C. T.—Clerk's Transcript.

the offense charged in Count One of the indictment and 20 years for the offense charged in Count Four of the indictment, said two 20 year sentences to run consecutively for a total period of 40 years.

A timely notice of appeal was filed and the judgment of conviction was affirmed by this Honorable Court in *Anthony v. United States,* 256 F. 2d 50 (Ninth Cir. 1958). On June 9, 1959, appellant filed in the United States District Court a motion to vacate his sentence pursuant to Title 28, United States Code, Section 2255, alleging insufficiency of the evidence as grounds therefore and said motion was denied on August 25, 1959. On November 9, 1959, appellant again filed a motion pursuant to Title 28, United States Code, Section 2255, to vacate the sentence of the District Court imposed on June 10, 1957, alleging basically the same reasons as in his first 2255 motion and his second motion to vacate sentence was denied on December 31, 1959.

Counsel was appointed by this Honorable Court for the appellant on May 7, 1960. Thereafter, a motion for leave to appeal *in forma pauperis* and to proceed on typewritten briefs was denied by this court on December 6, 1960. In February of 1961, the appellee, United States of America, moved this court to dismiss the appeal from the denial of the 2255 motion for failure to prosecute the appeal as provided in Rule 73 of the Federal Rules of Criminal Procedure. Said motion was granted on March 6, 1961. Certiorari was denied by the United States Supreme Court on October 9, 1961, which is reported in *Anthony v. United States,* 368 U. S. 852 (1961).

On March 22, 1963, appellant filed in the United States District Court for the Southern District of Cali-

fornia, Central Division [C. T. 3, to C. T. 19], a motion to vacate sentence pursuant to Title 28, United States Code, Section 2255, or in the alternative a motion to correct an illegal sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. On April 1, 1963 [C. T. 23], appellee, United States of America, filed an opposition to said motions. On April 15, and April 22, 1963, the Honorable Wm. C. Mathes, United States District Judge, heard oral argument on the said motions and the opposition to same. [C. T. 24-25.]

On April 25, 1963, the District Court made its findings of fact and conclusions of law denying appellant's third 2255 motion. [C. T. 26-28.] On May 6, 1963, a timely notice of appeal was filed. [C. T. 29.] Thereafter, the District Court made its order granting leave to appellant to appeal *in forma pauperis*. [C. T. 32, 33.]

IV.

QUESTIONS PRESENTED.

The questions presented by appellant are categorized into three arguments. They are whether there was sufficient evidence to show possession of the marihuana as to him, whether the jurisdictional requirement of unlawful importation of the marihuana was shown and whether a consecutive sentence of twenty years on each count of the indictment is a violation of due process of law and the infliction of cruel and unusual punishment. These questions will be answered by appellee in its brief in the instant appeal.

V.

STATEMENT OF THE FACTS.

Federal Narcotic Agent William C. Gilkey first saw Appellant's codefendant Lucas Landry on February 23, 1957, in Los Angeles [R. T. 9]*, at about 2:00 in the afternoon. The two men had a conversation in which Gilkey asked Landry if the latter knew where the agent could secure a connection for marihuana since he was interested in establishing himself in the marihuana traffic in Pasadena. [R. T. 11.] Defendant Landry stated that he might be able to supply Gilkey with a half pound of marihuana later on in the afternoon. Landry told Gilkey to call him back at 7:00 P.M. [R. T. 13.]

That evening Gilkey called defendant Landry on the telephone and asked the defendant if he had the half pound of marihuana. Landry said he didn't have it then and Gilkey was to call him back within an hour. Gilkey did call back within an hour and Landry asked him to go over to his house. [R. T. 15.]

Gilkey did so at approximately 8:15 P.M., and went in. Gilkey asked Landry if he had the half pound of marihuana and Landry said he didn't have it then but that he had made contact with a man who was to bring marihuana to his house. [R. T. 15, 17.] Gilkey agreed to wait. Later in this conversation, when Landry approached Gilkey with the possibility of the two of them going into the marihuana business together, Landry stated that he could possibly set himself up on the West side, a friend could set himself up out in Compton and Gilkey would cover Pasadena. The idea was for the three of them to pool their money and

*R. T.—Reporter's Transcript.

buy marihuana in large quantities, thus doubling the investment being put into it. [R. T. 18.]

Immediately thereafter the telephone rang and Landry spoke with someone. He stated, "Bring it on. Stud is here." Then Landry told Gilkey that the "stuff" would be there in a few minutes. [R. T. 18.]

About fifteen minutes later, appellant Laurence Frederick Anthony arrived at the apartment house in his 1947 Chevrolet and went inside carrying a brown paper bag of the type normally obtained in a grocery store. [R. T. 21, 113-114.] Landry asked appellant to step into the bedroom located by the living room where Gilkey was waiting. Appellant took the bag into the bedroom. It appeared to Gilkey that the bag contained something. Landry and Anthony remained in the bedroom for about five or ten minutes and then Landry came into the living room and asked Gilkey for $35.00, which was the agreed price for one-half pound of marihuana. Gilkey gave Landry $35.00 of official advance funds. [R. T. 21.] Landry took the $35.00 back into the bedroom where appellant was waiting while Gilkey remained in the living room. Two or three minutes later, appellant left through the front room. Landry then returned to the living room and asked Gilkey to go into the bedroom and see what he had purchased. [R. T. 22-23.]

Gilkey went into the bedroom with Landry who opened a drawer in the dresser in which was a brown paper bag similar to the one that appellant had brought with him. Gilkey looked in the bag at Landry's invitation and they poured the contents of the bag into a newspaper. Upon examining it the substance appeared to Gilkey to be similar to bulk marihuana. [Ex. 1 D;

R. T. 23.] Thereafter, the two men measured the quantity of marihuana contained in the bag [R. T. 26] and Gilkey carried it outside to the Government automobile where the container was initialed. [R. T. 27.]

In the meantime, appellant had gotten into his Chevrolet and left the vicinity. He was there about ten minutes altogether. [R. T. 116-117.]

Agent Gilkey saw the defendant Landry again on February 27, 1957, at approximately 8:45 P.M., in Los Angeles. He had telephoned Landry earlier and had asked him if he could supply another pound of marihuana. Landry had told Gilkey that the agent would have to call him again because his "connection" would not be home until later. [R. T. 29.] A "connection" was a source of narcotics. [R. T. 14.] Gilkey agreed and telephoned Landry shortly after 7:00 P.M. At that time Landry still had not heard from his connection but told Gilkey to come on by his house within an hour. [R. T. 29.]

At about 8:45 P.M. Gilkey arrived at Landry's home and went in. Gilkey asked Landry if the latter had the marihuana and the answer was yes. Gilkey was asked to come into the bathroom and see the marihuana, Landry explaining that the last time in the bedroom marihuana seed and debris had been scattered everywhere and he didn't want that to happen again. Landry told Gilkey the marihuana would cost him $70.00 since the price was still $35.00 for each half pound. The agent examined one of the bags and told Landry it looked all right. [R. T. 29-30.] Landry again approached Gilkey with the idea of the two of them going into the marihuana business together and Gilkey said he would think about it. He then gave Landry

$70.00 of official advance funds and Landry told him to call him when the agent got back into town. Gilkey then left after stating he might possibly do business with Landry the following weekend. [R. T. 31.]

In the meantime, appellant Anthony had been observed parked near the apartment as agent Gilkey went in. After Gilkey left, codefendant Landry came out and went over to appellant's car, got in and stayed a few minutes. He then got out and appellant left. [R. T. 117-119, 161-162.] (Appellant was not charged as a defendant in Count 2 relating to the above transaction.)

Agent Gilkey saw defendant Landry again on March 7, 1957, having previously called him at approximately 5:00 in the afternoon. Gilkey asked Landry if the latter could get two pounds of marihuana. Defendant Landry said to call him back around seven o'clock. After a couple of other calls Landry instructed the agent to go to his house, which Gilkey did around 8:15 P.M. Landry invited him in and said he had two pounds of marihuana. [R. T. 38.] He went to the rear of his house and returned with the marihuana. It was contained in a brown bag which codefendant Landry was carrying with him as he came back into the front portion of the place. Meanwhile, appellant Anthony's car was parked at the rear of the building. [R. T. 120, 163.] Inside, Gilkey was told by Landry that the price of the two pounds was $140.00, as it was still selling at $35.00 a half pound. Gilkey took the brown bag and walked to a Government automobile. While this happened, appellant had gotten in his car and circled the block, returned and parked near the apartment. After Gilkey left, codefendant Landry came out to appellant's car and got in for a few minutes. Then he went back to the apartment and appellant

departed. [R. T. 121-122, 164-165.] Later, at his office Agent Gilkey found that he had been shorted on the quantity of marihuana and immediately telephoned Landry in that respect. Landry said the marihuana had been brought to him that way and the "man" was the person responsible for the shortage in weight. Gilkey asked Landry to do something to make the weight up and the latter said he would look into it on a later date. [R. T. 41.] (Appellant was not charged in Count Three relating to this transaction.)

The next time Gilkey saw Landry was on the 11th day of March, 1957, at the defendant's home at around 8:15 P.M. [R. T. 45.] Earlier that afternoon he had spoken with Landry over the telephone. Gilkey asked the defendant if he had spoken with his source of supply about making up the half pound difference in the marihuana which had been shorted. Gilkey was told that the "man" said he would make up one-quarter pound but not one-half a pound. Gilkey then asked Landry if the agent could pick up two pounds of marihuana from him that evening. Landry told him that he could do so with a telephone call being made in advance of his visit. About seven o'clock, Gilkey phoned Landry, who stated that he hadn't heard anything as yet. Gilkey phoned back at 7:45 and arrangements were made for him to drop by Landry's house to pick up the marihuana. Gilkey arrived at Landry's house, parking his car in the rear driveway according to Landry's instructions. He then went into the house. [R. T. 45-47.] About five or ten minutes later the bell rang. [R. T. 49.] Appellant had gotten out of his car and walked to the rear portion of the address. [R. T. 153.] Landry answered the door at the rear. He went out to appellant's car and returned to the rear with a brown paper bag. [R. T. 153-154.] When

he reappeared in the living room, Landry had the brown paper sack in his hand and said to Gilkey "Here's your stuff." [R. T. 49.] Gilkey glanced in the top of the bag and looked in observing a substance that appeared to be marihuana. [Ex. 4 A-1.] Landry again approached him with the idea of going into the marihuana business together. Gilkey told him he would talk to him about it later and gave Landry $140.00 which had been requested as the price of two pounds of marihuana. Landry asked Gilkey to step through the kitchen and leave by the rear door which he did. As he got into his automobile he observed an automobile parked directly behind him blocking the driveway leading to the street. Gilkey asked Landry to do something about moving the car and the latter walked over to the automobile and spoke through the window. Gilkey recognized appellant as being in the front seat of the vehicle. Shortly thereafter, Anthony backed the automobil out and Gilkey followed with his own automobile, leaving the premises. Codefendant Landry then went over to appellant's car and got in for a few minutes. Shortly thereafter appellant left. [R. T. 155-156.] The bills comprising the $140.00 given to Landry on this occasion had been noted previously according to serial numbers. [R. T. 57-58.] Appellant was arrested at approximately 9:00 P.M., on the same evening pursuant to a warrant previously issued. The $140.00 was found on his person as well as the two bags of marihuana in his car. [R. T. 126-127(a), 156, 158.]

Appellant was convicted on Counts one and four respectively of unlawfully selling 5 ounces of marihuana on February 23, 1957 and 2 pounds 5 ounces of marihuana on March 11, 1957 which had been previously imported into the United States contrary to law.

VI.

SUMMARY OF ARGUMENT.

A. The District Court Had Jurisdiction of the Subject Matter Because There Was Sufficient Evidence and Clear and Convincing Proof of Possession of a Narcotic Drug by the Appellant.

B. The District Court Had Jurisdiction of the Subject Matter Because There Was More Than Sufficient Evidence to Show that the Marihuana Was Unlawfully Imported With the Knowledge of Appellant.

C. The Sentence in Appellant's Case Is Not in Excess of That Authorized by the Applicable Statute and Is Not Violative of the Fifth and Eighth Amendments to the Constitutions of the United States.

VII.

ARGUMENT.

A. The District Court Had Jurisdiction of the Subject Matter Because There Was Sufficient Evidence and Clear and Convincing Proof of Possession of a Narcotic Drug by the Appellant.

Appellant maintains and submits to this Court that the "jurisdictional" facts of possession of the marihuana involved in the sales of February 23, and March 11, 1957, were not shown as to himself by any clear and convincing proof or evidence in the trial court.

Any raising of the question of the sufficiency of the evidence as to appellant's conviction at this time is moot, as in the trial court, there was no motion on behalf of appellant for a judgment of acquittal either at the close of the Government's case, or at the con-

clusion of all the evidence in the case. [R. T. 219 and 330.]

White v. U. S. 317 F. 2d 231 (9 Cir. 1963);
Ege v. U. S., 242 F. 2d 879 (9 Cir. 1957);
Mosca v. U. S., 174 F. 2d 448 (9 Cir. 1949).

However, for the sake of argument, there was more than sufficient evidence to show possession of the marihuana in the appellant, both on February 23 and March 11, 1957, for the jury to return with a verdict of guilty.

Federal narcotics Agent William C. Gilkey personally arranged to make a purchase of marihuana from the appellant's codefendant Lucas Landry on the afternoon of February 23, 1957. [R. T. 9.] The evidence in the trial court was clear and convincing that Landry would have to obtain the contraband from a "connection" which is a source for obtaining same. [R. T. 15, 17.]

Landry even had conversations with Gilkey asking the latter to combine their resources and venture into the narcotics business, with Landry covering the West side of town, Gilkey covering Pasadena, and a friend covering Compton. [R. T. 18.] Gilkey went to Landry's house to obtain the narcotics, after learning from Landry that a third man was to deliver it to Landry's house. After arriving at Landry's residence, Gilkey heard the phone ring, and an obvious conversation took place between Landry and a third person arranging for the delivery of the marihuana. [R. T. 18.] A short while later, the appellant arrived carrying a brown paper bag. [R. T. 21, 113-114.] Both appellant and Landry then went into the bedroom.

Five or ten minutes elapsed and Landry came out and asked Gilkey for $35, the purchase price of the ma-

rihuana. [R. T. 21.] Gilkey gave it to Landry and the latter went back to the bedroom where appellant was waiting. Two or three minutes later appellant left.

Gilkey was then invited by Landry into the same bedroom and shown a similar brown paper bag as carried by appellant earlier. Inside this bag was bulk marihuana. [R. T. 22, 23.]

Sales of marihuana took place between Gilkey and Landry in Landry's home on February 27 and March 7, 1957, and either appellant or his automobile was seen in close proximity to Landry's residence on both of these occasions. Appellant was not indicted for these last two mentioned sales of marihuana, but certainly the jury could consider the fact of his close presence at the location of these two sales for the purpose of intent, to negative mistake and the issue of state of mind to infer and establish guilt as to appellant, as to the marihuana sale of February 23, 1957.

The next time Gilkey saw Landry was on March 11, 1957. Gilkey went to Landry's house to purchase marihuana. [R. T. 45.] He parked his car in the rear driveway. He went into the house. Prior to Gilkey going to the house, he had talked to Landry, and it was communicated to Gilkey by Landry that a third party was to deliver the marihuana to Landry's house. [R. T. 45-47.]

Five or ten minutes later, the door bell rang. [R. T. 49.] Appellant was at the door. [R. T. 153.] Landry and the appellant went to appellant's automobile Landry then returned alone and went into the house with a brown paper bag containing marihuana. [R. T. 153-154.] Gilkey gave Landry $140 of previously

marked money, received the marihuana and then went to his car.

Gilkey noticed a car blocking his egress to go out of the driveway. He asked Landry to do something about moving the car. Landry went over to the car and spoke through the window to appellant who was sitting in the vehicle. Appellant backed his car out of the driveway, in order to let Gilkey leave. Gilkey left. Landry then got into appellant's car and stayed a few minutes. Appellant then left [R. T. 155-156], and was arrested a short while later. On his person was found the previously marked $140 and in his car was found two bags of marihuana. [R. T. 126-127(a), 156-158.]

As to these two bags of marihuana, the trial court [R. T. 128-129], carefully instructed the jury that they were not to consider this marihuana for the purpose of convicting appellant of the sales of February 23 and March 11, 1957. The evidence of the existence of it however, was to be received for the sole purpose of again, negativing mistake, and to show state of mind or intent.

Based upon the statement of the facts mentioned above, it is the appellee's contention that there was more than sufficient evidence, and quite to the contrary overwhelming clear and convincing proof of either constructive or actual possession of marihuana in the appellant, both on February 23 and March 11, 1957.

It is well established law that the Government may prove possession and knowledge thereof of narcotics by circumstantial evidence alone.

Rodella v. U. S., 286 F. 2d 306 (9th Cir. 1960), cert. den. 365 U. S. 889 (1961);

Green v. U. S., 282 F. 2d 388 (9th Cir. 1960), cert. den. 365 U. S. 804 (1961);

Covarrubias v. U. S., 272 F. 2d 352 (9th Cir. 1959);

Johnson v. U. S., 270 F. 2d 721 (9th Cir. 1959), cert. den. 362 U. S. 937 (1960).

In *Evans v. United States, 257* F. 2d 121 (9th Cir. 1958), cert. den. 358 U. S. 866 (1958), the Court stated at page 128:

> "Proof that one had exclusive control and dominion over property on or in which contraband narcotics are found is a potent circumstance tending to prove knowledge of the presence of such narcotics, and control thereof."

A person also may be so sufficiently associated with the person having physical custody of the contraband, as when he is able, without difficulty, to cause the drug to be produced for a customer that he may be found by a jury to have dominion and control over the drug, and hence possession which if not explained satisfactorily to the jury, would be enough to convict.

United States v. Hernandez, 290 F. 2d 86 (2d Cir. 1961);

Cellino v. United States, 276 F. 2d 941 (9th Cir. 1960);

United States v. Malfi, 264 F. 2d 147 (3rd Cir. 1959), cert. den. 361 U. S. 817 (1959).

Further, this control or dominion can be shared with others and this fact would not destroy this constructive possession.

Lucero v. U. S., 311 F. 2d 457 (10th Cir. 1962), cert. den. 372 U. S. 936 (1963);

Gallegos v. U. S., 237 F. 2d 694 (10th Cir. 1956).

This Court stated in *Medrano v. U. S.,* 315 F. 2d 361 (9th Cir. 1963), at page 362:

> "Possession [of narcotics] of any sort is sufficient to raise the presumption and to place upon the accused the burden of explaining the possession to the satisfaction of the jury. Pitta, v. United States, 9 Cir., 1947, 164 F. 2d 601, 602; Cellino v. U. S., 9 Cir., 1960, 276 F. 2d 941."

In a recent opinion by this Court in *White v. United States,* 315 F. 2d 113 (9th Cir. 1963), the decisions of *Rodella, supra,* and Cellino, supra were reaffirmed at page 115:

> "Possession need not be actual possession, if there is circumstantial evidence sufficient to establish dominion of control."

It is respectfully submitted to this Court based upon the above authorities cited by appellee, that sufficient dominion and control by appellant of the marihuana sold by Landry to Gilkey on February 23 and March 11, 1957, was established by the evidence in the trial court to show possession in the appellant and a knowledge it was marihuana he possessed.

Appellant at no time sufficiently explained his possession to the satisfaction of the jury. This was enough to convict appellant of the crime of selling marihuana which had been unlawfully imported into the United States.

In contrast to the holding of *Williams v. U. S.,* 290 F. 2d 451 (9th Cir. 1961), the Government in appellant's case produced sufficient evidence from which possession, either actual or constructive, could be honestly, fairly and conscientiously inferred. Finally,

it is an established doctrine that this Court will not undertake the task of determining that the evidence was insufficient because of beliefs that inferences inconsistent with guilt may be drawn from it. If this Court did so it would become a trier of fact. Possession was a factual question for the jury whose determination should not be disturbed on appeal.

Green v. U. S., supra:

Stoppelli v. U. S., 183 F. 2d 391 (9th Cir. 1950), *cert. den.* 340 U. S. 864 (1950).

The judgment of the Court denying appellant's motion for a correction of an illegal sentence or in the alternative to vacate the sentence should be affirmed.

B. The District Court Had Jurisdiction of the Subject Matter Because There Was More Than Sufficient Evidence to Show That the Marihuana Was Unlawfully Imported With the Knowledge of Appellant.

Appellant maintains (App. Op. Br. p. 10) that as to marihuana, as distinguished from heroin and opium, the Government must prove besides unexplained possession in him some "indicia of foreign origin". He cites *Caudillo v. United States,* 253 F. 2d 513 (9th Cir. 1958), for the proposition that socalled "unmanicured" marihuana, *i.e.* containing seeds, sticks and stems must be shown to be possessed by him because a full grown plant containing this material would never grow in the United States as compared to some foreign country.

If the Court were to accept this argument it could easily affirm the judgment of the district court by

looking at the testimony on pages 30 and 86 of the reporter's transcript. That testimony is to the effect that there were *seeds and debris* in the marihuana which Gilkey purchased from codefendant Landry on February 23, 1957. Appellant's entire argument on his second specification of error is erroneous because of this testimony in the record.

However, instead of terminating this subject at this point appellee would respectfully submit to this Court that the holding in the recent case of *Costello v. United States,* 324 F. 2d 260 (9th Cir. 1963), is the proper and logical ruling on the question of knowledgeable possession of marihuana with the subsequent arising of the presumption of unlawful importation.

It would be absurd to distinguish between the presumptions contained in Title 21, Sections 174 and 176-(a) and hold that some indicia of foreign origin must be shown as to marihuana such as the "unmanicured" state before the presumption of unlawful importation for federal jurisdiction would arise.

In *Butler v. United States,* 273 F. 2d 436 (9th Cir. 1959), the Court stated at page 438:

> "Appellants urge that even though they may fail to change this Court's broad holding as to the constitutionality of the 'possession' clause in the last paragraph of §176a, this Court should interpret 'the marihuana' in the possession clause to refer to illegally imported marihuana, and hence there must be some evidence of illegal importation of the marihuana seized before any presumption sufficient to authorize conviction can come into existence.

The government has no practical method to trace back through one or a dozen hands to the person who originally grew the weed. If it had the means to so trace the paths of commerce to the plant's origin, there would be no need of any rule of evidence presuming importation, for importation could either be proved by the government, or the government would establish the marihuana as homegrown, and the government's case would fail.

Appellants' counsel urges that in the possession clause of § 176(a) Congress purposely uses the word 'the' with reference to marihuana, and not the word 'any'. We point out that the first previous reference to imported marihuana in § 176(a), after the word marihuana is first mentioned, is to 'such marihuana'. (Emphasis added.) When referring to marihuana in the possession paragraph, the Congress has apparently intentionally and carefully referred, not to such (i.e., imported) marihuana, but to 'the marihuana in his possession.' (Emphasis added.)

The presumption created is 'a rule, not of substantive law at all, but merely of evidence.' Ng Choy Fong v. United States, 9 Cir., 1917, 245 F. 2d 305, 307; Stein v. United States, 9 Cir. 1948, 166 F. 2d 851, certiorari denied 334 U. S. 844, ...

There would be no purpose in creating such an evidentiary rule were it applicable only to marihuana proved to have been imported illegally. We refuse to follow appellants' attempted distinction."

The Court went on to state that there was some physical evidence in the record such as in *Caudillo, supra,* that the marihuana was unmanicured. It pointed out that within the United States, both federal and state law enforcement agencies continually watch for this illegal growing plant. As a result of this observation, the plants leaves which are capable of producing marihuana are stripped off and dried long before the plant reaches maturity and therefore it does not flower so it cannot contain seeds.

Appellee submits to this Court that the reasoning of the Caudillo decision is not proper as far as showing that the marihuana has to have some foreign indicia of origin. It is obvious that the holding of *Costello, supra,* is proper and is a latter expression by this Court of the validity of the presumption contained in Title 21, United States Code, Section 176(a).

Whether the government shows some indicia of foreign origin is just another additional factor which the jury can weigh in order to decide whether the contraband was grown outside the United States and therefore imported unlawfully. The fact that marihuana is not shown to have stems, sticks or seeds in it does not render the presumption of unlawful importation arising from mere unexplained possession alone invalid.

As was said in *Costello, supra,* at page 263:

> "Appellant's second argument is based upon the contention that the record shows (a) that marihuana 'grows all over the United States . . . in the warm climates and the temperate climates,' and (b) that the particular marihuana here in question was 'manicured,' i.e., made up entirely of leaves, and that in the Caudillo and Butler cases

we took note of the fact that while 'unmanicured' marihuana is seldom produced in the United States, 'manicured' marihuana is seldom imported. The record in this case contains no such evidence. In Caudillo we pointed out that we know of no medical or scientific use to be made of marihuana, save perhaps for occasional testing in order to make scientific comparisons with other narcotics, barbiturates and amphetamines. We also note that the growing of marihuana is illegal in several states including California (the state there involved), and that by far the larger part of all marihuana found within the United States is imported. In Alaska, as in California, the growing or possession of marihuana is illegal. . . . The fact that the marihuana involved in Butler and Caudillo was 'unmanicured' was imply an additional factor entering into the decision in those cases.

Those cases certainly establish the proposition that the mere fact marihuana can be and is grown in the United States does not render the statute invalid. The only additional fact suggested here is that the particular marihuana appears to have been 'manicured.' However, this fact alone is not enough to require a decision that the statute is invalid as applied to Costello. . . ."

Also, the Court stated in *Caudillo, supra,* that the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. There is definitely a rational connection between the fact proved *i.e.* that appellant was in possession of marihuana with knowledge

thereof and the ultimate fact presumed, *i.e.* that said marihuana was imported contrary to law.

Even though some marihuana concedely grows wildly in certain parts of the United States (which probably represents a minute portion of all the marihuana illegally sold in this country) the presumption contained in Section 176(a) should not be defeated by requiring the government to show it had other material in it besides leaves. If this be so then the next step to undertake would be to require the government to show from where heroin was derived in Title 21, United States Code, Section 174 prosecutions. It is not so highly improbable that the plant from which heroin is derived in some devious manner could be grown domestically.

Also, if the government must prove indicia of foreign origin, what is to stop a defendant from separating the seed and other foreign matter from the leaves and disposing of same. If he is caught with just the leaves in his possession, he can say that he either grew the plant in his back yard or found it growing somewhere in a field. He could therefore deprive the Federal Courts in all cases of their rightful jurisdiction in these matters.

It is respectfully submitted that when Congress placed the identical presumptions of unexplained possession both in Sections 174 and 176(a), it was not their intention to have one distinguished from another. It is just as logical to presume that marihuana was grown outside of the United States the same as heroin. This Court was correct in *Costello, supra,* by stating that the "unmanicured" state of the marihuana is just another factor to consider to show foreign origin, but is

not the only factor, and therefore the presumption is not rendered ineffective by not showing the "unmanicured" state.

In *United States v. Kapsalis,* 313 F. 2d 875 (7th Cir. 1963), cert. den. 374 U. S. 856 (1963), at page 876 the Court stated:

> "A government witness on cross examination testified that marihuana is a plant indigenous to the United States; that it grows almost any place; that it grows in large quantities along the Sanitary District Canal in and around Chicago; it grows in back yards and under certain conditions can be grown in a flower pot on a window sill. He admitted that he did not know whether the marihuana found in defendant's possession was of foreign or domestic origin and, further, that the contents of the vial were all 'ground up leaves.' "

At page 877 the Court stated:

> "The question for decision, therefore, is whether possession alone under the circumstances shown was sufficient to authorize a conviction or, to state the question another way, whether such possession was sufficient to justify a finding that the marihuana was imported with knowledge on the part of the defendant."

Further, on page 877 the Court stated:

> "The presumption provision contained in Sections 174 and 176(a) has been treated in pari materia. See United States v. Taylor, 266 F. 2d 310 (7 Cir.); Caudillo v. United States, 253 F. 2d 513 (9 Cir.). Congress when it inserted the provision in the latter Section undoubtedly was

aware that the same provision had long been included in the former, and must be assumed to have had knowledge of the manner in which courts in many decisions had applied and given effect to the presumption provision."

On page 878 the Court finally concluded by stating:

"We agree with the Government's argument that if a reasonable doubt arises as to importation or defendant's knowledge thereof merely from the fact that marihuana is domestically produced, the provision would in effect be rendered nugatory. This is not to say, of course, that there may not be a case, although we suspect it is rare, where a defendant may be able to 'explain his possession to the satisfaction of a jury.'

"It is the possession however, which must be explained and in the instant case the defendant made no effort to do so; in fact, he was not asked, either by his own counsel or by that of the Government as to how possession was acquired. Defendants denial of knowledge of the contents of the vial and whether its contents were imported was no explanation of possession.

In any event, the explanation which the defendant offers must be to the satisfaction of the trier of facts. Here, the trier concluded that the so-called explanation was not satisfactory and we see no reason to substitute our judgment for his."

The Court stated in *United States v. Gibson,* 310 F. 2d 79 (2 Cir. 1962) at page 82:

"It is well settled that the inferences upon which the statutory presumption in 21 U. S. C. § 174

(heroin) is based are reasonable, and that the statute is constitutional. See Yee Hem v. United States, 268 U. S. 178 . . . United States v. Savage, 292 F. 2d 264 (2 Cir. 1961) and cases cited therein. Hillary contends that marihuana can be grown in the United States and, therefore, there is no rational connection between the possession of marihuana and illegal importation and knowledge thereof. He distinguishes Caudillo v. United States, 253 F. 2d 513 (9 Cir. 1958), where the Ninth Circuit upheld the marihuana statute here in question on the ground that the evidence there showed that the marihuana was imported. However we do not rely on Caudillo. This record does not contain any information as to the amount of marihuana grown in the United States, nor are we referred to any authority on the subject. We have no reason to believe, on the basis of this record, that Congress' enactment of the presumption in § 176a with regard to marihuana is any less reasonable than that in § 174 with respect to narcotic drugs."

There is nothing in this case's record to show how much marihuana is grown in the United States as compared to that grown abroad. On the contrary, as noted above, there is testimony to show the marihuana had seeds and other foreign matter in it and therefore was "unmanicured."

We submit to this Court, however, that whether the marihuana was manicured or unmanicured is not the determining factor to show unlawful importation. All that need be shown is unexplained possession in the

appellant. This was shown. The judgment of the Court denying Appellant's motion for a correction of an illegal sentence or in the alternative to vacate the sentence should be affirmed.

C. The Sentence in Appellant's Case Is Not in Excess of That Authorized by the Applicable Statute and Is Not Violative of the Fifth and Eighth Amendments to the Constitution of the United States.

The appellant was indicted in Counts 1 and 4 of a four count indictment along with his codefendant, Lucas Landry. Count 1 charged as follows:

> "On or about February 23, 1957, at Los Angeles County, California, within the Central Division of the Southern District of California, defendants Lucas Landry and Laurence Anthony, after importation and with intent to defraud the United States, did knowingly and unlawfully sell and facilitate the sale of approximately five ounces of bulk marihuana to William C. Gilkey, which said marihuana, as the defendants then and there well knew, had been imported into the United States contrary to law."

Count 4 was the same except it alleged a sale on or about March 11, 1957, involving two pounds, five ounces of marihuana.

Appellant was found guilty by jury trial and on June 10, 1957 [C. T. 2], he was sentenced as follows:

> "It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offenses of on or about February 23, 1957, and on or about March 11, 1957,

> . . . after importation and with intent to defraud the United States, did knowingly and unlawfully sell and facilitate the sale of bulk marihuana, which marihuana, the defendant then and there well knew had been imported into the United States contrary to law, as charged in Counts 1 and 4 of the indictment. . . . It is adjudged that the defendant is hereby committed to the custody of the Attorney General . . . for a period of 20 years and pay a fine unto the United States in the sum of $5,000 for the offense charged in Count 1 of the indictment . . .; and 20 years for the offense charged in Count 4 of the indictment, the two twenty-year sentences shall run consecutively so that the total period of imprisonment shall be forty years."

Title 21, United States Code, Section 176(a) provides that for a person convicted of this section for the first time, he or she shall be imprisoned not less than 5 nor more than 20 years and, in addition, may be fined not more than $20,000. Appellant's argument (App. Op. Br. p. 23), that Congress did not intend to provide multiples of 20 years for immediately consecutive individual transactions constituting elements of the same offense, might be correct if this Court were faced with that particular situation. However, as noted above, appellant was convicted for two independent sales of marihuana, one taking place on February 23, 1957, and the other on March 11, 1957. Approximately 16 days passed between the two sales.

When Congress legislated both sections 174 and 176(a) of Title 21, United States Code, into existence, its intent was to make receiving, concealing, buying,

selling, facilitating the transportation, facilitating the concealment of or facilitating the sale of marihuana or any narcotic drug each separate and independent crimes or they would not have bothered to include each in the respective statutes.

Burton v. United States, 202 U. S. 344 (1906);
Torres Martinez v. United States, 220 F. 2d 740 (1st Cir. 1955).

As was stated in *Gore v. United States,* 244 F. 2d 763 (D.C. Cir. 1957) at page 765:

> "The authorities are unanimous that a defendant may be convicted and sentenced under each of several counts of an indictment if each count states a different offense. The test of whether separate offenses are charged is whether some different evidence is essential to each count, or whether each count is supported by the same evidence. We said recently in Kendrick v. United States, 1956, 99 U.S. App. D.C. 173, 238 F.2nd 34:
>
> 'The test of identity is whether the same evidence will sustain both charges. If one of these offenses requires an element of proof which the other does not, a conviction of one does not bar prosecution for the other.' Id., 238 F.2d at page 36.
>
> "See also Blockburger v. United States, 1932, 284 U.S.299, 52 S.Ct. 180, 76 L.Ed. 306."

There is no question that the offenses charged in the indictment in appellant's case were different and separate offenses. They were committed on different

days; and the test of identity of offenses is whether the same evidence is required to sustain them.

Albrecht v. United States, 273 U. S. 1 (1926);

Morgan v. Devine, 237 U. S. 632 (1915);

Everett v. United States, 227 F. 2d 457 (6 Cir. 1955).

Since they were different offenses the statute (Section 176(a)), provides for a maximum period of incarceration on each offense of 20 years. The District Court sentenced appellant to the custody of the Attorney General for a period of 40 years. This does not violate the spirit of the statute. It is not illegal and the lower court was correct in not reducing or correcting it under Rule 35 of the Federal Rules of Criminal Procedure.

The sentences given the appellant by the District Court were within the limits allowed by Section 176(a). as this court stated in *Brown v. United States,* 222 F. 2d 293 (9 Cir. 1955), at page 298:

> "The subject stressed on this appeal is the severity of the sentences meted out to appellant. And he urges us to reduce and modify the sentences. " 'If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute.' Gurera v. United States, 8 Cir., 1930, 40 F.2d 338, 340."

Young v. United States, 286 F. 2d 13 (9 Cir. 1960), cert. den. 366 U. S. 970 (1961);

Flores v. United States, 238 F. 2d 758 (9 Cir. 1956).

Also the action of the District Court in sentencing the appellant to the custody of the Attorney General for a 40-year period of incarceration was not an arbitrarily or capriciously applied act and therefore did not deny the appellant of due process of law in violation of the Fifth Amendment of the United States Constitution.

As was said in *United States v. Chicago Professional Schools, Inc.,* 290 F. 2d 285 (7 Cir. 1961), at page 286:

> "Defendant Keane strongly urges that the punishment imposed by the trial judge upon her was cruel and unusual and forbidden by the Eighth Amendment to the United States Constitution. In order to try to understand why the trial court imposed such a heavy sentence, we have taken upon ourselves the burden of carefully reading many hundreds of pages of typewritten transcript of the evidence. We also have carefully noted the comments and remarks of the trial judge during the trial. We still are at a loss to understand why a prison sentence of five years was imposed upon Doris Keane who had no previous criminal record of any kind."
>
> "The writer of this opinion, based in part upon his nearly ten years' experience as a Federal Trial Judge, agrees with appellant that the sentence imposed upon her was severe. It may well be that many other Federal District Judges would have imposed a lighter sentence in this case.
>
> It generally is recognized that disparity of sentences for similar criminal offenses, creates serious problems. Recently, Congress has provided for

the holding of institutes on sentencing in the various judicial circuits. It is the hope of the sponsors of this legislation and of Congress that the great disparity of sentences in Federal District Courts now all to prevalent, might, to some extent, be avoided.

Judges on our United States District Courts come to the bench with different backgrounds and varying legal or judicial experiences. They bring to the bench different attitudes, values and standards. It seems quite evident that their will always exist different views as to the nature and amount of punishment to impose in criminal cases.

However, the disparity in sentences and injustices caused because of the severity of sentences might be alleviated to some extent, if the District Judges would utilize the provisions of recent legislation which Congress has enacted.

Among such provisions is Title 18, U.S.C. Section 4208 which provides a sentencing judge may designate a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less but not more than one third of the maximum sentence imposed by the Court. Under another provision of this section, the Court may fix the maximum sentence and provide the prisoner may be eligible for parole after such time as the board of parole may determine.

However, the sentence of Doris Keane was within the maximum which might have been imposed under the statute. Under repeated decisions of this Court such as United States v. Hetherington, 7th Cir., 279 F.2d 792, 796; United States v. De

> Marie 7th Cir., 261 F.2d 477, 480; United States v. Kapsalis, 7th Cir., 214 F.2d 677, 684; . . . we hold the judgment must be and is affirmed."

Neither parole nor probation nor the provisions of Title 18, United States Code, Section 4208 are allowed when sentencing a person for violation of Title 21, United States Code, Section 176(a) according to Title 26, United States Code, Section 7237.

Congress has provided a twenty year maximum period of imprisonment in Section 176(a). The sentences in this case were within those limits. The District Court in exercising its discretion when sentencing appellant was well aware of all factors pertaining to appellant's particular background and circumstances. Whether the Court decided to sentence appellant to a minimum mandatory sentence of five years or the maximum of twenty years was within its discretion. This Court has no right to disturb those sentences for if it did it would be acting as a trial court and this is not its function.

Appellant attacks the sentence in this case as being violative of the Eighth Amendment to the Constitution to the United States. In *Pependrea v. United States,* 275 F. 2d 325 (9th Cir. 1960) the Court stated at page 329:

> "It is well settled that a sentence within a valid statute cannot amount to 'cruel and unusual punishment,' and that when a statute provides for such punishment, the statute only can be attacked."

Russell v. United States, 288 F. 2d 520 (9th Cir. 1961), cert. den. 371 U. S. 926 (1962), clarifies the issue even more as the Court stated at page 524:

> "We presume we were intended to be referred to Bryson v. United States, 9th Cir., 1959, 265 F. 2d 9, which is in point, holding that the sentence in the case, being within the limits fixed by the statute, should not be disturbed on appeal by any claim it was cruel or unusual. (Id. at page 13.) In Bryson, the sentence imposed was the maximum permitted by the statute. Here, of course, it was not. In holding that the maximum term of imprisonment so imposed was not cruel or unusual punishment, this Court followed a long line of cases establishing the rule in this circuit, and in other jurisdictions, holding that the Court of Appeals has no jurisdiction to substitute its judgment for that of the trial judge, so long as the sentence is within the period prescribed as maximum punishment. (Cases omitted)."

Appellant is not questioning the validity of Title 21, United States Code, Section 176(a). He questions the validity of the sentence under the statute. Again appellee respectfully submits to the Court that it was within the discretion of the District Court to sentence appellant to forty years imprisonment. It was not a violation of due process of law or cruel or unusual punishment.

The District Court was well within its legal right when it sentenced appellant to consecutive sentences of twenty years each. Sentences for separate crimes may be consecutive.

> *Sherman v. United States,* 241 F. 2d 329 (9th Cir., 1957, cert. den. 354 U. S. 911 (1957);

Ellerbrake v. King, 116 F. 2d 168 (8th Cir. 1940);

Brown v. Johnson, 91 F. 2d 370 (9th Cir., 1937), cert. den. 302 U. S. 728 (1937);

Parmagini v. United States, 42 F. 2d 721 (9th Cir., 1930) cert. den. 283 U. S. 818 (1930).

One further comment is necessary by appellee. Appellant cites (appellant's Opening Br. p. 28) *Weems v. United States,* 217 U. S. 349 (1910) for the proposition that the length of a particular sentence may amount to cruel and unusual punishment the same way it applies to the methods used to enforce a particular sentence.

At page 355 of the *Weems* decision the Court stated:

> "The prohibition of cruel and unusual punishment has no application to a punishment which only exceeds in degree such punishment as is usually inflicted in other jurisdictions for the same or like offense."

Also on page 356 the Court stated:

> "There is nothing cruel or unusual in a long term of imprisonment, as the words are used in the Bill of Rights. The description there refers rather to multilations and degradation, and not to length or duration of the punishment."

The holding in the *Weems* case, it is true, was to the effect that the Philippine law in dealing with the punishment in that particular case was cruel and unusual. But, the crime was making a knowingly false statement by a public official in a public record. The penalty was fine and imprisonment in a penal institution at hard and painful labor for a period ranging from

twelve years and a day to twenty years, the prisoner being subjected, as accessories to the main punishment, to carrying during his imprisonment a chain at the ankle hanging from the wrist, deprivation during the term of imprisonment of his civil rights, and subjection besides to perpetual disqualification to enjoy political rights, hold office, etc., and, after discharge, to the surveillance of the authorities. It is conceded that this is cruel and unusual punishment as defined in our Bill of Rights.

However, appellee respectfully submits to this Court that the length of a sentence, be it even more than is usually given in other districts, is not cruel and unusual punishment protected by the Eighth Amendment. The quantum of the punishment is not protected. It is only the quality as in the *Weems* decision, *supra.*

In *United States v. Kawakita,* 96 F. Supp. 824 (S.D. Cal. 1950), the defendant had been convicted for eight overt acts of treason against the United States. He was sentenced to death according to the applicable statute. The statute, Title 18, United States Code, Section 2381 (1927 Ed.) also provided that in the discretion of the Court, the defendant could be imprisoned not less than five years and fined not less than $10,000 and would be incapable of holding any office under the United States.

The United States Court of Appeals for the Ninth Circuit affirmed the judgment in *Kawakita v. United States,* 190 F. 2d 506 (9th Cir. 1951). Certiorari was granted and the United States Supreme Court affirmed in *Kawakita v. United States,* 343 U. S. 717 (1952).

Having exhausted every possible avenue for judicial review such as appellant has done in this case, the de-

fendant Kawakita made a motion to modify his sentence of death before the Honorable William C. Mathes, United States District Judge.

In denying this motion the Court stated in *United States v. Kawakita,* 108 F. Supp. 627 (S.D. Cal. 1952) at page 632:

> "Finally it should be noted that the President alone is vested with 'power to grant reprieves and pardons for offenses against the United States . . .' U.S. Const. Art. II, Section 2, cl. 1. 'The benign prerogative of mercy reposed in him cannot be fettered. . . .' in any case. Ex Parte Garland, 1866, 4 Wall. 333, 71 U.S. 333, 380. . . .
>
> "The separate functions of the executive and the judicial departments with respect to punishment for offenses against the United States is fully explained in Ex Parte United States, 1916, 242 U.S. 27, 41-42, 51-52, 37 S. Ct. 72. . . . The Supreme Court there declared that 'the right to relieve from the punishment fixed by law and ascertained according to the methods by it provided, belongs to the executive department.' Ex Parte United States, supra, 242 U.S. at page 42, . . ."

Executive clemency is not just a private act of an individual possessing power to execute same but is part of the Constitutional scheme. It is submitted to the Court that the proper remedy for the appellant is to seek executive clemency from the President of the United States if he feels his sentence should be less than what the judgment fixed.

The District Court was within its right in imposing the forty year sentence. The judgment of the Court denying appellant's motion for a correction of an illegal sentence or in the alternative to vacate the sentence should be affirmed.

VIII.
CONCLUSION.

For the reasons stated, it is respectfully submitted that the Judgment of the Court denying appellant's motion for a correction of an illegal sentence or in the alternative to vacate the sentence should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MYRON ROSCHKO.